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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 96

THE UNITED STATES OF AMERICA, PETITIONER,

v.

GREAT NORTHERN RAILWAY COMPANY.

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, OPPOSING GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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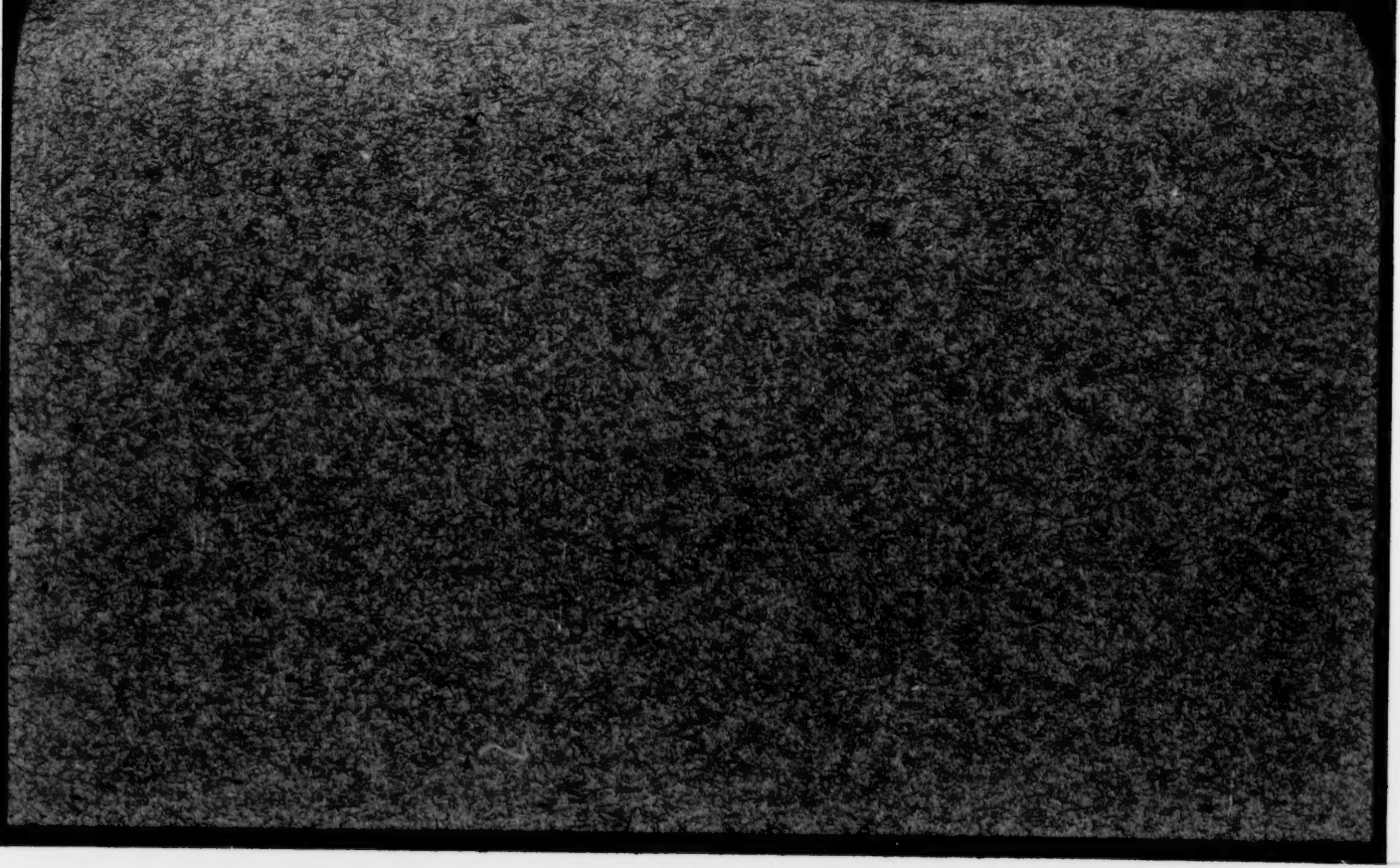
Dated at Washington, D. C., May 21, 1932.



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Grounds for Opposing the Writ.

The second question presented in the Government's petition is the question whether the Commission did in fact make a definite ascertainment of the amount paid to respondent. The Government urges that while the

Commission's own certificate declares that it did make a definite ascertainment, the testimony of one of its employees contradicts this and offers "convincing evidence" that what the Commission made was a mere estimate, and not a definite ascertainment.

If this were the only question presented here, we believe that this Court would be slow to grant certiorari for the sole purpose of reexamining the evidence after two lower courts have passed upon its sufficiency. The contention that the Commission's own solemn recital of fact in its formal certificate stands for naught when contradicted by the testimony of a subordinate employee is an unusual one. But when that recital is supported by as much documentary and oral evidence as we have produced here and when two courts have found that the evidence sustains it, there would be little justification for asking this Court to reexamine the record upon that question alone.

The first and only other question presented is one of construction of the statute. If there were a serious question of statutory construction as to whether certificates and payments under Section 212 of the Transportation Act were intended to be binding upon the Government, and if courts of appeals in two different jurisdictions had considered this question fully and reached opposite conclusions, this Court might well be asked to determine the question by writ of certiorari. However, we believe we can convince the Court that this question of statutory construction is not a seriously debatable or reasonably doubtful one; that this was conceded by the Government in the court below; that

the seemingly contrary statement made by the Court of Appeals of the District of Columbia in the *Northern Pacific case* was not necessary to the determination of that case but was rather in the nature of *dictum*, and was made without full consideration, and without any knowledge of the legislative history of the statute and on a different state of facts. We hope to convince this Court that this question of statutory construction and this apparent conflict of decisions are now being resurrected by the Government without any reasonable hope of prevailing upon that issue and solely for the purpose of creating an apparent justification for a writ of certiorari, and thereby obtaining an otherwise unobtainable review of the question of fact.

A decision of a lower court, made in accordance with an admission of a party in that court, should not be assigned as an error by that party in the upper court, and the upper court should not be asked to take its time to review a question which the party conceded away in the court below.

Petitioner points out that large sums have been refunded to the Government by other carriers on account of alleged overpayments under Section 212 and argues that if the decision below is not reviewed by this Court, numerous suits will undoubtedly be brought against the United States to recover the amounts so refunded. We submit that there is no reasonable probability of any such suits because there would be no possibility of recovery therein. Amounts voluntarily refunded by carriers without protest could not be recovered on the mere ground that the carrier making the payment

erroneously supposed itself legally liable therefor. *U. S.* v. *Edmunston,* 181 U. S. 500.

Moreover, where the Government has received money under an assertion of right, there is no implied contract to return it. Consequently the Court of Claims would have no jurisdiction of an action, and the action would not lie in any other court. *Temple* v. *U. S.,* 248 U. S. 121.

Petitioner argues that its second question, as to what constitutes a valid determination by the Commission under Section 212, may arise in other litigation, as indicated by the similarity between the facts of this case and those of the *Northern Pacific case.* However, the *Northern Pacific case* is finally disposed of and not open to further litigation and petitioner fails to suggest any other case in which a similar question might be litigated.

The delay in this case might be fraught with most serious consequences to the respondent. While the record in the present case does not show it, the record in *Great Northern Railway Company* v. *United States,* 277 U. S. 172, will show that we have upon deposit with the Secretary of the Treasury, as security for the payment of any judgment which the Government may recover, approximately $2,000,000 worth of Liberty Bonds which can be withdrawn only upon final decision of this action in our favor. Our public reports to the Interstate Commerce Commission will show that the further retention of this $2,000,000 might easily change our position from one of solvency to one of default in our interest obligations during the present year. While this would be no ground for denying the writ where

reasonably doubtful questions are involved, we submit it in the hope that this Court will give very particular attention to the question whether a reasonably debatable question is presented, before granting the writ.

ARGUMENT.

The Finality of a Certificate for Partial Payment Under Section 212.

In the "Reply Brief for the United States" filed in the Circuit Court of Appeals, the Government conceded on page 3 that "apparently Congress intended the Government to be bound by advances under Section 212, assuming, of course, that the Commission had in truth and in fact made a definite ascertainment required as a prerequisite to such payment." This was also conceded upon oral argument in the court below. The effect of this concession is to admit that the contrary holding by the Court of Appeals of the District, in the *Northern Pacific case* was erroneous. It is, therefore, surprising to find petitioner now renewing its original contention that the Government was not to be bound by these partial certificates, and that there is a serious conflict of decisions in two different jurisdictions which requires settlement by this Court.

That the partial certificates were intended to be binding *pro tanto* is indicated by the following considerations:

(1) The *wording* is similar to that of Section 209 (g), which authorizes the final settlement, and which the Government concedes would be binding. Section 209 (g) says, "The Commission shall * * * *ascer-*

tain and certify * * * the several amounts necessary to make good the foregoing guaranty * * *". Section 212 says, "The Commission, if not at the time able to determine the whole amount due * * *, may make its certificate for any amount definitely *ascertained* by it to be due * * *". Both sections use the word "ascertain", but Section 212 adds the word "definitely", so that the wording of Section 212 is even stronger than the wording of Section 209 (g), which admittedly provides for a determination that shall be binding.

(2) Section 212 contains two paragraphs. Paragraph (b) covers "deferred debits and credits" such as unsettled damage claims, while paragraph (a) covers all other items. Paragraph (b) permits a reasonable estimate of deferred debits and credits to be used as a definitely ascertained amount, but provides that such estimates "shall be *prima facie* but not conclusive evidence of their correctness in amount in final settlement". There is no such provision as to items other than deferred debits and credits which are covered by paragraph (a). If all items certified under Section 212 were to be merely *prima facie* but not conclusively correct, why enact a special provision to that effect as to one class of items only? In this sentence, Congress had apt language for the purpose of making the entire certificate *prima facie* but not conclusive, and it rejected that language except as to deferred debit and credit items. *Expressio unius exclusio alterius.*

In answer to this argument, the Government brief

says on page 17, "The explanation of the provision is that Congress was providing for something in the nature of a settlement as to deferred items, and, without an express contrary declaration in the statute, this settlement might have been regarded as conclusive". This is exactly the argument which we make as to paragraph (a). "Without the express contrary declaration" in paragraph (a), a settlement thereunder must be regarded as conclusive, especially when such a contrary declaration is included in paragraph (b) but omitted in paragraph (a).

This reasoning is strengthened by the legislative history of paragraph (b). As this paragraph was introduced, it provided that the Commission's "reasonable estimate" of the net effect of deferred debit and credit items, when agreed to by the carrier could be used as a definitely ascertained amount, and that such estimate so agreed to "shall be binding in final settlement". Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "*prima facie* but not conclusive evidence of their correctness in amount". This amendment was debated on pages 2815 and 2816 of Congressional Record, Volume 60, Part 3, and was adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "*prima facie* but not conclusive" while the defi-

nite ascertainment of all other items, under paragraph (a), was left conclusive and binding.

This becomes all the more significant when we find on page 2812 of the Congressional Record a similar attempted amendment of paragraph (a) which was voted down. In other words, as originally introduced, both paragraphs were to be binding. Separate amendments were proposed as to each paragraph, the effect of which would be to make the certificate subject to correction and refund. The amendment was voted down in the case of paragraph (a) and adopted in the case of paragraph (b).

(3) If Congress had intended to provide for a mere advance on account, subject to refund, it had language apt for that purpose before it in Section 209 (h), which had provided for advances if made during Federal Control. But it rejected the word "advance" and provided for a "payment", and it rejected the express provision for refund of excess if any, which had been carried in Section 209 (h).

(4) Even if the language of the statute left any possible ambiguity, the reports of the Congressional Committee and the statements by those in charge of the measure remove all doubt. During the debates, those opposing the measure repeatedly objected to the bill on the ground that certificates issued under its provisions would be conclusive, and the majority members of the Committee who were in charge of the bill replied that this was exactly the result intended; that they proposed to make the partial payment as binding for the amount involved as the final payment would be. We will quote here some short examples of this.

In Volume 60, Part 3 of the Congressional Record, on page 2739, Mr. Sims, a minority member, said:

> "This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission's certificates must be paid in full and no return whatever to the Government is provided for such excessive payment."

On page 2813, Mr. Barkley, a minority member of the Committee, said:

> "But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then, under the language of this bill, that estimate which has been arrived at must be *final settlement as to that item,* and the Government has no recourse to offset that claim against another claim that may be adjusted in the future". (Italics ours.)

A little further down, Mr. Barkley says:

> "But if you leave the language like it is, you have this situation: every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement."

The foregoing quotations are from remarks by members of the opposition who pointed out very clearly that certificates issued under the proposed bill would be binding upon the Government. That this was fully

understood by the majority members in charge of the bill and that it was the exact result intended to be accomplished appears from the following quotations:

Mr. Denison, page 2813, said:

> "The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.
>
> Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?
>
> Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend."

The following appears on page 2803:

> "Mr. Hardy (of Texas): Does not subsection (b) foreclose the Government in any error forever thereafter?
>
> Mr. Barkley: That is my understanding."

Mr. Dempsey said, page 2809:

> "Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First he assumes that the Interstate Commerce Commission is to make some fatal error and he wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another * * *."

The following appears on page 2809:

> "Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?
>
> Mr. Dempsey: Why, the Interstate Commerce Commission issues a certificate upon the facts, and its decision is made upon all of the data obtainable.
>
> Mr. Reavis: But if we pay more than is due?
>
> Mr. Dempsey: We are just as likely to be right now as at any time in the future."

Mr. Winslow said, page 2812:

> "Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the estimated amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

> Now, in this instance, we have another situation. Whatever amounts will be paid under the Bill before us will rest upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debits and credits. There is a very different situation indeed."

On page 2802 occurs the following:

> "Mr. Montague: As I understand it, there is no bond required if there were only one final payment.
>
> Mr. Merrit: None.
>
> Mr. Montague: And you simply ask that the same rule apply here?
>
> Mr. Merrit: Certainly."

If it be asserted that these were expressions by individual members of Congress only, even though majority members of the Committee in charge of the bill, and that they do not necessarily reflect the opinion of Congress as a whole, we point to the amendment proposed by Mr. Barkley. On page 2812 appears the following:

> "Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under Sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of

> the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

On page 2815, the following action on this amendment appears:

> "The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115."

It thus appears that Congress not only rejected the apt language in Section 209 (h) providing for a refund of excess payments, and rejected in paragraph (a) the apt language which it inserted by amendment in paragraph (b), providing that the certificates should be *prima facie* but not conclusive evidence of their correctness as to deferred items only, but it deliberately and specifically rejected a proposed amendment to Section 212 (a), which would have made any excess in the partial payment certificate, over the amount of the final certificate, recoverable. The intent could be no clearer if Congress had expressly added a clause in Section 212 (a) reading, "and no excess in such partial payment over the amount of the final certificate shall be recoverable".

On page 16 of its brief, petitioner points out that the Barkley amendment was rejected partly on the supposition that there would be no overpayments, since the Commission was authorized to certify only those amounts which it had definitely ascertained were due, and petitioner argues that rejection of the amendment under these circumstances does not show that Congress construed Section 212 as barring the United States from recovering payments made thereunder. We sub-

mit that the contrary is true. The circumstance shows a clear intent by Congress that the Commission should certify only such amounts as it could feel definitely certain of and that after it had once satisfied itself of such amounts and had certified them, there should be no refund and no recovery. If any refund or recovery had been intended, the proposed amendment would have been adopted.

There also appears in the Congressional Record, 66th Congress, 3rd Session, pages 108 and 109, a letter from Chairman Clark of the Interstate Commerce Commission to Chairman Esch of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated January 22, 1921, while Section 212 was pending, clearly advising the Congress that the Interstate Commerce Commission would understand the bill as authorizing it to make definite ascertainments and definite payments. Chairman Clark said:

> "Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier."

On page 14 of brief for petitioner, the Government argues that in authorizing "*partial* payment", Con-

gress necessarily implied that any excess should be refunded, since any payment in excess of the total obligation cannot be a partial payment. What Section 212 (a) authorizes is not a "partial payment" but "any amount definitely ascertained by it to be due". If the amount were to be subject to refund, the proper term to use would be the word "advance" which was used in Section 209 (h), or the word "loan" and not "payment", whether partial or otherwise. The word "payment" imports finality.

On the same page, petitioner argues that the making of a partial certificate presupposed that further consideration would be given in the making of a final certificate, and, therefore, negatived finality in the partial certificate. But clearly Congress had the constitutional power to declare that a payment, then regarded as only partial, should nevertheless become vested in the payee without liability for refund, no matter what the final conclusion might be. Notwithstanding the fact that the payment, then regarded as only partial, was to be conclusively vested in the payee, it would still be necessary to complete the final determination, in order to determine whether any additional amounts were due. Whether the partial certificate were conclusively or only *prima facie* correct there must still be provision for a final determination. The fact that such final determination is provided for, therefore, throws no light whatever upon the question whether the partial certificate was intended to have conclusive or only *prima facie* weight.

On page 15 of petitioner's brief it is argued that the purpose of Section 212 was to give prompt relief,

and that if the partial certificates were to be made with sufficient exactness to be binding upon the Government, they could not be rendered promptly. This last statement ignores the fact that Congress had been specifically advised that the Commission was already prepared to make definite ascertainments, and that these would not involve delay. On page 2738 of the Congressional Record, Mr. Cooper had quoted the preceding annual report of the Commission, referring to "the immediate payment to some of these carriers of the amounts or parts of amounts *which we can now determine to be certainly due them,* under the Guaranty provisions of the Transportation Act, 1920". (Italics ours.) And Chairman Clark of the Interstate Commerce Commission had advised the Congressional Committee in the letter above quoted, that "a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier".

When Section 212 was enacted, the Commission had been studying the formulæ and methods of determining payment for a year and had had as many as 40 men employed in this work (R. 55, 62). It had had the advantage of two or three years' previous experience of the Director General in determining the same questions (R. 63). On October 18, 1920, more than 4 months before Section 212 was passed, the Commission had issued its very elaborate order and questionnaire calling upon the carriers for the information necessary to conclude final settlements (R. 143). On January 29, 1921, more than a month before Section 212 was enacted, it had actually concluded a final

settlement under Section 209 (g) with the Norfolk Southern Railway, which is conceded to have been a definite and final ascertainment (65 I. C. C. 798, R. 114-116).

In *Continental Tie and Lumber Company* v. *United States,* No. 560, decided May 16, 1932, and not yet reported, this Court said:

> "But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under section 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return. (Note No. 3.)

We submit that there is no foundation in the record for petitioner's argument that a requirement of conclusiveness in the partial certificates would have prevented prompt action. All of the information before Congress was to the contrary.

We submit that the Government has presented no argument entitled to serious consideration upon the question of statutory construction and that in view of the wording of the statute and the legislative history of the Act, the question is not a seriously debatable one. This conclusion is fortified by the fact that the Government was forced to admit it in its reply brief

in the court below. In view of all this, we feel justified in taking the position that the question is resurrected here not with any reasonable hope of securing a favorable decision from this Court upon that question, but solely for the purpose of importing the sort of an issue which might justify certiorari.

The seemingly contrary decision of the Court of Appeals of the District of Columbia in *Northern Pacific Railway Co.* v. *Interstate Commerce Commission*, 23 F. (2nd) 221, was made upon a different state of facts and without knowledge of the legislative history of the Act and the statement regarding the construction of the statute was not necessary to the decision. In that case the carrier filed in the Supreme Court of the District of Columbia, a petition for a common law writ of certiorari to review and set aside the Commission's *final* certificate issued under Section 209 (g). It appears from pages 13 to 30 of the brief for the Interstate Commerce Commission which was filed in this Court in opposition to a writ of certiorari, that the main contention of the Government in that case was that the carrier had pursued the wrong remedy in seeking to review the Commission's certificate by common law writ of certiorari from the Supreme Court of the District. Moreover, even though the previous partial certificate issued to that carrier under Section 212 were binding and conclusive, this would not necessarily invalidate the subsequent final certificate under Section 209 (g) or warrant the court in setting it aside on writ of certiorari. We submit that the district court in that case should simply have dismissed the application for a writ

because of lack of jurisdiction, without attempting to pass upon the conclusiveness of the previous partial certificate.

Moreover, that case presented facts different from those in the present case. On page 224, the court points out that the Northern Pacific in applying for its partial payment had agreed to refund any excess which might later be determined. There was no such agreement in our case.

But the most significant difference is that the debates in Congress upon Section 212 and the extracts from the Congressional Record which we have quoted above were not called to the attention of the District Court of Appeals. A decision by the District Court of Appeals made without knowledge of the legislative history of the Act cannot be regarded as evidence that the conflict is a serious one or that the question is really debatable.

We might add that there is an obvious fallacy and inconsistency in the reasoning of the court in the *Northern Pacific case.* It argues that Section 212 could not have contemplated a "definite ascertainment" because that would have necessarily involved delay and Congress desired prompt action; but at the same time the court says that Congress desired something more than the mere "estimate" provided for in Section 209 (h) because the carrier's bond or security was to be dispensed with. In other words, promptness was to be accomplished by avoiding a thorough investigation and security was to be accomplished by requiring one. We submit that if Congress desired certainty in order to justify the waiving of security, then it might as well

make the payment conclusive, as we contend that it did, for the delay would be incurred in any event. Moreover, the court was under a misapprehension in assuming that a definite ascertainment would have involved delay. As we have pointed out above, the Congressional Record shows that while Congress was considering the bill, it had been advised that the Commission was already prepared to make definite ascertainments without any substantial delay.

The District Court of Minnesota and the Circuit Court of Appeals of the Eighth Circuit are the only courts which have passed upon this question with full consideration and full knowledge of the legislative history, and with full knowledge of the facts disclosed by the Congressional Record. We submit that the decision of the Court of Appeals of the District in the *Northern Pacific case,* involving different facts, and being in the nature of a *dictum,* and made without knowledge of the facts disclosed by the Congressional Record, does not create a conflict which would warrant this Court in issuing a writ of certiorari.

We submit that in view of the clear wording of the statute, and the positively convincing legislative history, this cannot be regarded as a doubtful question, or as one that is subject to real conflict, and that, having conceded away this question in the court below, petitioner should not now revive it for the purpose of inducing their court to take jurisdiction.

The Evidence Does Not Show That the Commission Failed to Make a Definite Ascertainment.

The Commission itself certified that it had made a definite ascertainment. Two courts have heard or ex-

amined all of the evidence and have found not only that it fails to conclusively negative this certificate, but that the Commission did in fact make a definite ascertainment. Unless a writ of certiorari is otherwise justified, we submit that it should not be issued solely to review again the evidence on this question.

The amount of investigation and study necessary to make a definite ascertainment is not defined in the statute and is necessarily left largely to the discretion of the Commission. If it could be shown that the supposed ascertainment was made by drawing a number from a hat or by pure guess work, the certificate might be set aside, even though the facts were proven only by the testimony of a subordinate employee, if undisputed. This would amount to fraud.

But the evidence shows that the Commission had been studying this question for a year and had had a force of 40 men engaged exclusively upon it (R. 55, 62). They had had the assistance of a large amount of previous investigation by the Director General of Railroads and by committees of the Railway Executives Association (R. 63, 113, 116). They had issued three general orders giving instructions as to methods of calculation (R. 143, 174, 176). The last one, that of October 18, 1920, prescribed elaborate forms and contained an extensive questionnaire occupying 34 printed pages of the record in this case (R. 143-177). Respondent's return to this questionnaire was an elaborate document containing 119 pages of data (R. 57-58). When it was filed the record states that:

> "There were several representatives of the Bureau, both of the accounting and engineering

> sections, engaged in conferences with different representatives of the defendant during the working or weekdays between February 14th and 23rd, approximately 8 or 9 days" (R. p. 60).

They rejected some items, required a correction of others and allowed still others to stand. At the conclusion of these conferences, they submitted a report of their work to the Commission covering 4 printed pages of the record, itemizing the deductions and corrections which had been made and explaining the reasons therefor (R. 210-214, 214-217). The computations were in odd dollars and cents and not in round numbers. It was very far from merely drawing a number from a hat or making a guess. This evidence certainly justified the lower courts in finding that at the very least, the Commission had made an earnest *bona fide* effort to satisfy its mind with certainty that the amount certified was really due.

Men might differ in their opinions of the thoroughness of this work. One man prone to work by generalization and hasty conclusions might characterize it as unnecessarily thorough and cautious. Another man prone to most meticulous detail might regard it as insufficient, perfunctory or a mere estimate. The fact that an examiner employed by the Bureau used the latter adjective as his characterization of the work cannot invalidate a solemn declaration by the Commission itself, that it considered its work a definite ascertainment and a proper exercise of the discretion conferred upon it by Congress. The testimony that

the Examiner had been "instructed to make the same kind of examination as those made upon applications for advances under Section 209 (h), which required merely an estimate of the Guaranty", proves no insufficiency in this ascertainment. It may simply go to show that the Commission had been very cautious and thorough in making its previous advances. Moreover, this testimony is directly contradicted by written instructions from the Director of the Bureau, dated March 2, 1921, the day following our certificate, in which it is said, "Partial payments are not based upon estimates as were advances under Section 209 (h), but represent definite ascertainments. * * * Partial payments being based upon definite determinations and not upon estimates, must be based upon the same character of adjustments as final payments are based upon" (R. 253).

The fact that the Bureau originally labeled its report as an "estimate" likewise proves nothing. As petitioner itself points out, the label attached by subordinate employees is not controlling. Certainly it is not so conclusive as to negative, as a matter of law, the Commission's own certificate that it regarded its findings as a definite ascertainment, or to warrant setting aside the findings of two lower courts supporting this certificate.

The fact that the examination was made before Section 212 was enacted, and with the intention of issuing a certificate for credit purposes, upon which the carrier might obtain a bank loan, proves nothing as to the thoroughness of the examination or the definite-

ness of the determination. It would stultify both the Commission and the Bureau to declare that they were purposely careless or that their examination and determination were purposely made uncertain, because it was bank money that was involved, and not Government money. At the very time when this examination was going on, Section 212 was being debated in Congress, and its passage had previously been recommended by the Commission. Its early enactment must have been anticipated at the very time that the examination was being made. As soon as Section 212 was definitely enacted, the Commission, knowing of its requirement of a definite ascertainment, and with full knowledge of the extent of its previous investigations and the definiteness of its previous conclusion, adopted that conclusion as a "definite ascertainment" under the Act. Even though the examination had had the legal status only of an estimate at the time it was made, it could very readily be given the status of a definite ascertainment under Section 212 if adopted and declared to be such by the Commission after the passage of the Act. Two courts have sustained it as such, and we submit that this Court would not be justified in issuing a writ of certiorari to reexamine this question.

On January 29, 1921, more than a month before our partial certificate was issued, the Commission had issued a final certificate to the Norfolk Southern Railway under Section 209 (g), 65 I. C. C. 798 (R. 114-116). This final settlement admittedly involved a definite ascertainment and has never been questioned.

The examination in the *Norfolk Southern case* was also made prior to the enactment of Section 212 and was very similar in scope, method and time expended to that in the Great Northern case. We invite comparison of the examination in the Great Northern case (R. 96-106, inc. and 108) with the examination for the purpose of final settlement with the Norfolk Southern (R. 114-116).

That the Commission was not only in a position to make definite ascertainments at the time of our examination but that it actually contemplated doing so, is further indicated by the letter of January 22, 1921, from Chairman Clark of the Commission, *supra*, in which he said, "It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding in the language. There is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier". This was followed on March 2, 1921, by the written instructions of the Bureau, *supra*, to the effect that "partial payments are not based upon estimates as were advances under Section 209 (h), but represent definite ascertainments." And that was followed in turn by a statement by the Commission itself in 70 I. C. C. 711, decided December 15, 1921, in which the Commission said on page 714, "We are required to make a definite ascertainment for partial payment purposes as

clearly as we are required to make definite ascertainments in final settlements".

Thus the Commission's official statement in our partial certificate that it had definitely ascertained the amount due, is supported by Chairman Clark's letter more than a month previous that it intended to make definite ascertainments and by the Director's written instructions on the following day that definite ascertainments and not mere estimates must be made. And yet this Court is asked to issue a writ of certiorari and to reverse the two lower courts on the bare ground that an Examiner considered the work perfunctory and a mere estimate.

On page 19 of its brief, petitioner asserts that the Commission failed to eliminate deferred items from our claim or to reach an agreement with the carrier as to the net effect of deferred items and that this was in violation of Section 212 (b) and so invalidated the certificate. But at the time of our certificate, the deferred items remaining on our books amounted to only $200,000 (R. 66). The Commission arbitrarily deducted $3,205,688 from our total claim before making its certificate (R. 215). Section 212 (b) imposed no *obligation* upon the Commission to allow anything at all for deferred items or to enter into any agreement regarding them. It merely "authorized" the Commission to do so "whenever in its judgment practicable." As long as a deduction was made, far in excess of the amount of the deferred items, before certifying the balance, there can be no complaint upon this ground.

On page 20 of its brief, petitioner argues that the Commission did nothing more than deduct amounts

"seemingly obviously unallowable" from the amount of our claim, and then make a further arbitrary deduction of $3,200,000 more. This is a very incomplete statement. What really happened was that respondent's claim had been computed according to methods and formulæ known to and studied by the Commission for several months and by the Director General for several years before (R. 63). The Commission made a thorough mathematical check of the figures in these returns to satisfy themselves that there were no mathematical errors (R. 98). Claims for increase in prices were thoroughly checked and corrected (R. 98, 99).

Section 209 specified the methods which the Commission was to follow in making these allowances and the Commission attempted to comply with all these requirements as far as the amount of information and time available would permit (R. 62). An elaborate report of the allowances, rejections and corrections was submitted by the Bureau in writing in which the Bureau concluded, "We have examined the data submitted by the applicant and find that the Government would have to pay not less than $15,705,688 to make good the guaranty, of which $6,500,000 has already been advanced" (R. 215).

On page 18 of its brief, petitioner argues that "until the Commission had determined basic principles to be applied in computing the Guaranty, it was not possible definitely to ascertain that any particular amount was due on account of the guaranty to respondent." But the Commission had admittedly "definitely ascertained" the amount due to the Norfolk Southern Railway, more than a month prior to our partial certificate,

by making a final certificate under Section 209 (g) in favor of that carrier, which has never been questioned. That the Commission itself considered the basic principles sufficiently settled for the purpose of a definite ascertainment is indicated by the fact that at the presentation of respondent's claim on February 14, 1921, respondent's General Auditor was advised by the Assistant Director of the Bureau that respondent could get either a final settlement or an advance and that either would take about ten days' time. Certain claims of the respondent would be rejected in either case but respondent chose a partial payment rather than final settlement in the hope that claims then being rejected might later be allowed (R. 108). However, this offer from the Bureau is positive proof that they then considered the basic principles to be sufficiently settled for the purpose of a final determination.

The statute did not specify that the method of ascertainment should be by first determining "basic principles" and then applying them to individual cases. The principles and methods used in computing our allowances had been known to and under study by the Commission for months (R. 63). Some of these principles had been disapproved by the Commission and others had been questioned. Still others had not been questioned. Where the methods were either disapproved or questioned, items under them were rejected from our claim. Only methods and principles as to which no question had then arisen were allowed to stand. The Government witness himself says, "Wherever the defendant had followed a method or principle

which the Commission considered questionable, it made a deduction to cover it'' (R. 69). We submit that it was entirely competent and lawful for the Commission to study the methods and items of our claim and to determine which of them it would reject and which it would allow to stand, and to base a certificate on the items thus approved, even though it had not previously adopted these methods or principles for general use. This is exactly what it did in making a final settlement with the *Norfolk Southern Railway* (R. 114-116).

Section 212 (a) specifically provides that ''The Commission, *if not at the time able finally to determine the whole amount due* * * * may make its certificate for any amount definitely ascertained by it to be due.'' The fact that it was not yet able to make a final certificate was not to prevent its making a partial certificate, but on the contrary it was expressly authorized to definitely ascertain a partial amount even though not able to make a final determination as to the entire amount.

In the first paragraph of Part II of its brief, petitioner bases its case on the contention that there is ''convincing evidence'' that the Commission did not make a definite ascertainment. After the trial court has passed on the facts and the evidence, its findings have the effect of a jury verdict, and it takes something more than ''convincing evidence'' to reverse its findings. In order to obtain a reversal, the findings must be without any substantial evidence to support them. Petitioner does not seem to claim that in this case.

We submit that there is nothing in Part II of petitioner's brief to warrant a writ of certiorari and that when the Commission's own certificate asserts that it has made a definite ascertainment, and after two lower courts have found to the same effect, this court should not issue the writ on such testimony of a subordinate employee as is offered here.

Our Defense Not a "Technical" One.

In the first paragraph of its "Argument," petitioner says that respondent "rests upon the technical defense that Section 212 bars the recovery of this overpayment." We protest against this statement. As a matter of fact, we offered ample evidence to prove that the payments which we have received were inadequate and that the Commission's final certificate was based upon grossly erroneous methods and principles (R. 102-113, 154-155). We do not discuss this evidence here because the trial court considered it irrelevant and did not pass upon it. But we are prepared to satisfy any court that we have been grossly underpaid and not overpaid and that we are not seeking to retain on a technicality what does not belong to us as of right.

Our actual expenses for maintenance during the Guaranty Period were $28,892,000, while the amount which the Commission allowed in its final order of 1926 was only $23,815,000, a shortage of more than $5,000,000 which we had to bear by shrinking our guaranteed compensation (R. 108). The final certificate of 1926 for $11,170,214.02 eliminated the tremendous sum of $4,535,473.98 from the amount of $15,705,688 which the

Bureau reported, on February 28, 1921, as the amount to which we were entitled (R. 215). The Government has failed to point out any erroneous item in the larger amount. It made no attempt to satisfy the court that the methods used in making the final certificate were more sound or the result more correct. The final certificate of 1926 was made by a Commission with seven new members. We have a simple case of a difference of opinion by two different bodies of men. We believe that our evidence contained in this record proves conclusively that the later decision was grossly inadequate and the Government offered no evidence to prove it more correct. We feel that we cannot submit this brief without a protest against the charge that we are relying upon a technical defense to retain an overpayment.

Conclusion.

We conclude that in Part II of its brief, petitioner is asking the court to review a voluminous record to find merely "convincting evidence" that the Commission made no definite ascertainment, notwithstanding its own certificate and the findings of two lower courts to the contrary. We believe that the evidence in our favor on this question is so overwhelmingly convincing that no seriously debatable question is presented.

In Part I of petitioner's brief, this court is asked to review a question of statutory construction, as to which the wording of the statute and the legislative history are so plain that the Government itself conceded the correctness of our construction in the court below. We can only conclude that that question is resurrected here

in the hope, not that the Government may prevail on that question, but that, being here on that question, this court may then be induced to review the other question of fact. We believe that neither question permits of a reasonable doubt serious enough to justify a writ of certiorari. We earnestly submit that this court should not be burdened with such a case and that the final decision should not be delayed.

Respectfully submitted,

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Dated at Washington, D. C., May 21, 1932.